

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CRAIG M. KELLY**

Claimant

VS.

**ASSOCIATED WHOLESALE GROCERS**

Self-Insured Respondent

)  
)  
)  
)  
)  
)

Docket No. 1,046,045

**ORDER**

Claimant appealed the August 20, 2009, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

**ISSUES**

Claimant requests medical benefits and temporary total disability benefits for an alleged May 31, 2009, accident. In the August 20, 2009, Order, Judge Hursh denied claimant's requests for benefits after finding claimant failed to prove he sustained an injury arising out of and in the course of his employment.

Claimant contends he has proven he injured his left shoulder at work due to the repetitive lifting he performed for respondent. Claimant requests the Board to reverse the August 20, 2009, Order; authorize Dr. Sankoorikal for treatment; and remand this claim to the Judge on the issues of temporary total disability benefits and the reimbursement of medical expenses.

Respondent and its insurance carrier (respondent) contend claimant has not proven that any complaints he may have regarding his shoulder are related to work. Respondent contends claimant only suffered symptoms of dizziness and disorientation at work and the doctor upon whom claimant relies to link his injury to work had an incorrect history. Accordingly, respondent requests the Board to affirm the preliminary hearing Order.

The only issue before the Board on this appeal is whether claimant sustained accidental injury arising out of and in the course of his employment with respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Respondent is a grocery wholesaler. Claimant worked for respondent for approximately three months and his job in respondent's warehouse was loading pallets with the goods that respondent's customers ordered. The maximum height of the loaded pallets was seven feet. Once or twice an hour claimant lifted and stacked items weighing around 80 to 90 pounds. Most of the items, however, weighed 30 pounds or less.

While filling his third or fourth order on Sunday, May 31, 2009, claimant began feeling dizzy. He described the situation as follows:

I was doing my order and while I was doing it I was just getting like real dizzy and incoherent and I'd have to stop, stepping on and off of my vehicle that I was using, which is only like a six-inch height, you know, stepping down and up. I would just have to stop and hold on a minute, you know, just did like a self check, then I'd keep going.<sup>1</sup>

Claimant testified he was not experiencing shoulder symptoms at that time.

Claimant promptly reported his symptoms to his supervisor, who hailed respondent's emergency medical technician (EMT). The EMT checked claimant's blood pressure, asked about his food and fluid consumption, and administered Breathalyzer and urinalysis tests. Claimant testified he had breakfast that morning around 10:00 or 10:30, began working at 12:30 p.m., and had a sports drink and granola bar after arriving at work. He also testified he had been taking an anti-inflammatory medication for gout in a finger for approximately a week and a half before the incident at work.

Respondent gave claimant three options; namely, going to the KU Medical Center (which claimant believed would be closing in 15 minutes), going to the Shawnee Mission Medical Center (which claimant was told would entail a several-hour wait), or going home. Claimant chose the latter.

After arriving home, claimant began to experience some soreness in his shoulder.<sup>2</sup> Apparently that soreness began the next day (June 1), the same day claimant first noticed

---

<sup>1</sup> P.H. Trans. at 13.

<sup>2</sup> *Id.*, at 17, 18.

shoulder swelling.<sup>3</sup> Claimant was scheduled to be off work on both Monday and Tuesday. Nevertheless, he called his supervisor several times on Monday and again on Tuesday to tell him about his shoulder symptoms. But claimant's supervisor never answered. On Wednesday, claimant reported his shoulder symptoms to respondent's safety supervisor, David Turner. Mr. Turner told claimant to see his own doctor. But Mr. Turner also indicated respondent might reassess its position if claimant obtained a doctor's note relating his shoulder problem to work.

Claimant then obtained an attorney, who referred claimant to Dr. Daniel D. Zimmerman of Westwood, Kansas. The doctor examined claimant on July 2, 2009, and took left shoulder x-rays. The x-rays showed osteoarthritic change affecting the acromioclavicular joint. The doctor concluded claimant's left shoulder and left trapezial musculature symptoms were from performing repetitive work activities. Dr. Zimmerman, however, mistakenly believed claimant's shoulder symptoms began while he was lifting and moving merchandise at work. The doctor wrote, in part:

[Claimant] developed pain and discomfort affecting the left shoulder and the left trapezius musculature in repetitively lifting and moving merchandize *[sic]* in carrying out job duties as an order puller for [respondent].

He indicated in his employment that he was required to stack cans on pallets above his head. He indicated in doing this activity repetitively that he developed severe pain and discomfort affecting the left trapezial musculature and the left shoulder. He indicated that he reported the pain and discomfort affecting his left trapezial musculature and the left shoulder to his supervisor. He indicated that he was sent home and told to relax to see if the soreness in the musculature throughout this area would relent.

He indicated that he returned to work and attempted to carry out work activities. He indicated within a brief period of time that he again had severe pain and discomfort affecting the left trapezial musculature and the left shoulder. He indicated that he then developed swelling affecting the left pectoral musculature.<sup>4</sup>

In short, the history recited by Dr. Zimmerman is not the history related by claimant's testimony. Accordingly, at this juncture the medical evidence fails to link claimant's shoulder symptoms to his work. Claimant's burden of proof is more than a strong

---

<sup>3</sup> *Id.*, at 27.

<sup>4</sup> *Id.*, Cl. Ex. 2 at 1, 2.

suspicion. The law requires that claimant persuade the trier of facts by a preponderance of the credible evidence that his position on an issue is more probably true than not true.<sup>5</sup>

In conclusion, the preliminary hearing Order entered by Judge Hursh should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>6</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the undersigned Board Member affirms the August 20, 2009, Order entered by Judge Hursh.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2009.

---

KENTON D. WIRTH  
BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge

---

<sup>5</sup> K.S.A. 2008 Supp. 44-508(g).

<sup>6</sup> K.S.A. 44-534a.